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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Petitioners,

v.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF OF RESPONDENT McDONNELL DOUGLAS CORPORATION IN OPPOSITION

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STATEMENT REQUIRED BY RULE 28.1

This brief is filed on behalf of McDonnell Douglas Corporation, which has no parent companies or subsidiary or affiliated companies (except wholly-owned subsidiaries).

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The Petition for Certiorari filed by the Islamic Republic of Iran, the Ministry of Defense of the Islamic Republic of Iran, and the Islamic Republic of Iran Air Force (collectively "Iran" or "petitioners") is predicated upon two supposed "facts" which both lower courts found not to exist. As a result, the purported Question Presented by the Petition is not in fact raised by this case.

I.

The Petition assumes that the "Negotiation" provision of the contract between the parties is a "forum selection clause"

which mandates resolution of contractual disagreements in the courts of Iran. Both the trial court and the Court of Appeals, applying Missouri law, concluded that the clause was not mandatory but precatory. Hence, there was no agreement to litigate in Iran, and thus the Petition is pegged on a false premise.

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the parties to an international towage contract agreed that "any dispute *must* be treated before the London Court of Justice." Likewise, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the relevant provision stipulated that controversies "shall" be settled in a certain forum. In contrast, the operative clause of the McDonnell Douglas-Iran contract stated:

> "Article XV — Negotiation — Any difference or disputes from the execution of the contract that may not be settled amicably *should* be settled through the Iranian courts." (Emphasis added.)

The Eighth Circuit noted that one of the primary dictionary definitions of "should" is "to express a desire or a request." *Webster's Third International World Dictionary*, p. 2104. It also cited Missouri law holding that "should" may denote "nothing more than an expression of opinion" (Pet. App. 9a). The parties used the term "shall" in 18 different articles in their contract, thereby confirming that they knew how to make a provision mandatory when they so desired. The use of "should" in the Negotiation article manifests an understandable unwillingness by respondent to be bound to the Iranian forum.

Accordingly, since the forum clause is not mandatory, the issue as to which Iran seeks review is not presented by this case.

II.

A second prop underlying the Petition is the fairly astonishing thesis that respondent can obtain even-handed, impartial and unbiased justice in Iran and is required by the decisions of this Court to submit to the jurisdiction of that country's courts. It is

hard to imagine that Iran intends that argument to be taken seriously in light of the Ayatollah Khomeini's continued excoriation of the United States through his "hate America" campaign, the seizure of 52 American hostages for 444 days, and the fact that there are still no diplomatic relations between the two countries.

Contrary to the intimations of the Petition, this Court has never held that a forum clause is enforceable in all circumstances. In *The Bremen, supra* at 18, the Court envisioned an exception to even a mandatory forum provision if the stipulated forum would be seriously inconvenient to one of the parties and thus inappropriate:

> "In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain."

Respondent carried this burden by submitting extensive affidavits confirming the revolutionary changes in the Iranian legal system since the Ayatollah came to power.[1] These af-

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[1] The Johnson Affidavit, which is assailed here by Iran (Pet. 9), was based on personal knowledge and detailed the changes in the Iranian legal system that made justice unattainable for American citizens. The affidavit, which was properly considered as that of an expert under Rule 703, Fed. R. Evid., traced the replacement of civil judges with Islamic religious jurists, the persecution and dismemberment of the Tehran Bar Association, and the subjugation of the legal system to Islamic religious principles dictated by the Ayatollah. The witness also concluded that because of the prevailing conditions and threats against the professional bar, no trained Iranian attorney would be free to conduct an independent representation of an American company in litigation in Iran against the Islamic government or any of its political subdivisions or controlled entities (Johnson Aff. ¶¶2, 13).

fidavits, however, were largely surplusage because the court was well within its discretion in taking judicial notice of the atrocities committed in Iran, the breakdown of the Iranian justice system and the fact, among other things, that a State Department advisory still warns against travel to Iran. As petitioners readily note, there is nothing close to a conflict among the Circuits on this issue, for every Court that has been faced with the prospect of subjecting an American citizen to post-Khomeini Iranian justice has refused to do so, and most have utilized judicial notice to support their conclusion.

In *Rockwell International Systems, Inc. v. Citibank, N.A.*, 719 F.2d 583 (2d Cir. 1983), the Court of Appeals refused to enforce a contractual provision stipulating that disputes "must be settled in accordance with the rules and laws of Iran via referring to the competent Iranian courts." Viewing the forum clause as mandatory, the court nevertheless held:

> "Neither [party] argues that the post-revolutionary Iranian judicial system is capable of affording an adequate remedy; courts that have passed on this contention have consistently rejected it." *Id.* at 587-88.

Similarly, in *Itek Corp. v. First National Bank of Boston*, 511 F. Supp. 1341, 1349 (D. Mass. 1981), *vacated on other grounds*, 704 F.2d 1 (1st Cir. 1983), the court ruled that a cause of action against the Iranian government can no longer be considered "an adequate remedy":

> "In reaching this conclusion, we take judicial notice of the fact that the present domestic situation there has rendered access to Iranian courts futile." 511 F. Supp. at 1349.

In *American International Group, Inc. v. Islamic Republic of Iran*, 493 F.Supp. 522 (D.D.C. 1980), *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981), the court declined to require exhaustion of judicial or administrative remedies in Iran, stating as follows:

> "Resort to such legal means is unnecessary when such remedy is impracticable or futile . . . . At the time of nationalization Iran was in such a state of turmoil that recourse to the Iranian courts was impossible . . . . Plaintiffs' employees were in physical danger, forced out of Iran, and generally unable to perform most of their ordinary duties during the period following the nationalization decree . . . . Further, the United States severed all diplomatic relations with Iran on April 7, 1980, and imposed a ban on travel to and from Iran on April 17, 1980. Executive Order No. 12211, Fed. Reg. 26685 (1980). It is absolutely clear that the Republic of Iran has shown a complete and utter disregard for international law by its seizure and holding of diplomatic hostages for a period exceeding eight months and its disdain of all diplomatic and international efforts to obtain their release. It is well settled in international law that where local remedies would be ineffective or meaningless or would not meet the international standard of minimum justice, the alien need not subject himself, in the first instance, to the local courts or administrative tribunals." 493 F. Supp. at 525.

To the same effect are *Behring International, Inc. v. Imperial Iranian Air Force,* 475 F. Supp. 383 (D. N.J. 1979); *Stromberg-Carlson Corp. v. Bank Melli Iran,* 467 F. Supp. 530 (S.D.N.Y. 1979); *American Bell International, Inc. v. Islamic Republic of Iran,* 474 F. Supp. 420 (S.D.N.Y. 1979).

Perhaps the most down-to-earth articulation of life in Iran was iterated by Judge Haight in *Rasoulzadeh v. Associated Press,* 574 F. Supp. 854, 861 (S.D.N.Y. 1983), in words that could have been written for this case:

> "In the case at bar, I have no confidence whatsoever in the plaintiffs' ability to obtain justice at the hands of the courts administered by Iranian mullahs. On the contrary,

> I consider that if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."[2]

In light of the well-chronicled atrocities which the Iranian government has visited upon many of its own people and on citizens of other countries, and in light of Iran's profound and unconcealed hatred of the United States, it ill-behooves that country to come before this Court and profess with an apparent straight face that it would gladly welcome American citizens into its courts and treat them fairly. This Court may, as others have done, take judicial notice of the unfairness and inadequacy of the Iranian judicial system. The lower courts certainly did not abuse their discretion in refusing to abdicate in favor of such biased proceedings.

The Petition also mistakenly assumes that respondent was required to establish the total absence of any disputed fact concerning the Iranian legal system, in apparent reliance on Rule 56, Fed. R. Civ. P. This contention misconceives the role of the trial judge in a forum selection context. As this Court observed in *The Bremen,* the existence of a forum clause does not deprive the local court of jurisdiction. Rather, such a clause requires the trial court to exercise sound discretion to determine whether the provision should be enforced. *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.,* 739 F.2d 4, 6-7 (1st Cir. 1984); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler,* 578 F.2d 953 (3d Cir. 1978); *Central Contracting Co. v. Maryland Casualty Co.,* 367 F.2d 341, 345 (3d Cir. 1966). The Ninth Circuit, in the recent case of *Pelleport Investors v. Budco Quality Theatres,* 741 F.2d 273, 280 (9th Cir. 1984), stated the applicable principles as follows:

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[2] Petitioners' suggestion that these cases are outdated and that "modern" Iran is more civilized (Pet. 27 n. 2) is both wrong and wide of the mark. The lawsuit by Iran in Tehran was filed in 1982, and thus the relevant inquiry relates to the suitability of an Iranian forum in 1982. Moreover, the Iran-Iraq war, which is the focus of petitioners' damage claim, continues unabated even today.

> "In *The Bremen,* the Supreme Court specifically held that a forum selection clause does not oust the district court of jurisdiction. A court is not required in every circumstance to exercise the jurisdiction it may possess. Courts often refuse to hear a case on *forum non conveniens* grounds. There is no reason they similarly cannot refuse to hear a case on the ground that it was not brought in the forum selected by the parties. The question is whether the court should exercise its jurisdiction to do more than specifically enforce the forum clause, which gives effect to the expectations of the parties, as manifested in their agreement."

The issue before the Eighth Circuit, therefore, was not whether respondent was entitled to summary judgment on the forum issue but whether the district court abused its discretion in refusing to force respondent to litigate in Iran. The court could receive and consider affidavits on that subject and did not need to be satisfied that there were no disputed facts. And, of course, in the process of that determination, the doctrine of judicial notice was readily available. Courts should not be required to blind themselves to obvious realities.

* * *

The issue which petitioners seek to bring to this Court is not properly presented by this case. The Eighth Circuit resolved the question that was presented in a manner consistent with the determination of every other court that has faced it.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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